90-1804

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No. 90-

In the Supreme Court of the United States

OCTOBER TERM, 1990

PAUL E. QUIRK AND BEATRICE QUIRK,
PETITIONERS,

v.

TOWN OF SANDWICH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Does a person in adverse possession of land have a property interest that is subject to protection under the Due Process Clause?

2. Do proceedings by a Town against the disseised record owner of land that result in the forfeiture of the property interest of a person in adverse possession of the same land violate the Takings Clause?

3. Where Massachusetts law places municipalities and private land owners on an equal footing with respect to adverse possession of land, has the Massachusetts court violated the Equal Protection Clause by granting a preferential interest to a municipality that acquires ownership through a tax foreclosure?

II

LIST OF PARTIES TO THE PROCEEDING

In the proceedings in the Massachusetts Supreme Judicial Court, the parties were:

Paul E. Quirk and Beatrice Quirk, defendants, appellants; and

The Town of Sandwich, Massachusetts, plaintiffs, appellees.*/

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*/ In earlier proceedings in the lower courts, the Town of Sandwich also proceeded in the form of the Inhabitants of the Town of Sandwich by its Board of Selectmen, and as Bruce Stanford, Joan Russell and Lawrence Harrington as the duly elected members of the Board of Selectmen of the Town of Sandwich, Massachusetts.

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REFERENCE TO REPORTS OF OPINIONS DELIVERED IN THE CASE

The opinion of the Supreme Judicial Court of Massachusetts ("SJC") is reported as Town of Sandwich v. Quirk, 409 Mass. 380, 566 N.E.2d 614 (1991), and is reproduced in the appendix. A-1.

The opinions of the Land Court Department of the Trial Court of the Commonwealth of Massachusetts ("Land Court") dated March 2, 1989 and June 21, 1989, from which the appeal decided by the SJC was taken, are reproduced in the appendix. A-17, A-26.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment sought to be reviewed was entered by the SJC on February 21, 1991. A-34.

Jurisdiction of this Court to review the judgment in question by writ

of certiorari is based upon 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Constitution of the United States, Amendment V: "No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV, Section 1: "No State shall make or enforce any law which shall ... deprive any person of ... property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mass. Gen. Laws c. 60, § 53, reproduced at A-37.

Mass. Gen. Laws c. 237, § 16, reproduced at A-40.

Mass. Gen. Laws c. 260, § 31, reproduced at A-40.

STATEMENT OF THE CASE

This case arises out of the taking of land by a town from persons who now have lived on the land for twenty-six years, without notice, compensation or an opportunity to be heard. The town seised the land to pay back taxes assessed to third parties.

Petitioners, Paul and Beatrice Quirk ("Quirks") have lived on some seventy acres of land on Cape Cod in Sandwich, Massachusetts ("Locus") since 1965. While in adverse possession of the Locus, they built a house on it and held rodeos there. Respondent, the Town of Sandwich ("Town") issued the Quirks a building permit for their house, permits to hold the rodeos and provided police for traffic control.

In the 1970s the Town assessed the four parcels that make up the Locus and billed the disseised record owners, not the Quirks, for real estate taxes. When the disseised owners failed to pay the taxes, the Town took the land for non-payment of taxes. The Town never sent bills or notices to the Quirks.

Between 1971 and 1977 the Town obtained decrees of foreclosure in the Land Court on the equity of redemption in the parcels that made up the Locus. The Town never notified the Quirks of these proceedings.

During the course of these proceedings, the Quirks learned of the Town's actions and offered to pay the back taxes. This offer was refused.

The Town did not seek entry or possession of the Locus until 1986, when it brought actions for a writ of entry and for trespass, asserting its claimed ownership of the Locus. These actions were consolidated in the Land Court. By then the Quirks had occupied the Locus for twenty one years, one year longer than the Massachusetts period for obtaining the fee by adverse possession.

At trial, the Town moved to preclude all evidence of adverse possession after the tax takings and foreclosure decrees. The Land Court granted the motion, A-17, holding that a tax lien foreclosure proceeding, an in personam action against the record owner of the land, was analogous to the in rem proceedings for registration of title to land, and thus terminated the rights of all parties other than the Town,

including those of the Quirks. Consequently, the court reasoned that the Quirks could prevail on their adverse possession claim only if they could show possession for twenty years after the entry of the decree of foreclosure. A-24-25.

The Land Court ruling made presentation of any evidence pertinent to due process and just compensation futile. Judgment was entered for the Town, from which the Quirks appealed. A-26, A-35.

The SJC heard the appeal and in its Decision ("Decision") affirmed the rulings of the Land Court. A-1.

The SJC Decision did not rely upon the reasoning of the Land Court that an in personam tax lien foreclosure proceeding had the same effect upon an adverse possessor as an in rem

registration proceeding. Instead, the SJC made a public policy determination that the tax taking interrupted the adverse possession.

Because the SJC characterized the Quirks as mere trespassers with only "inchoate rights" its Decision assumed that they did not have any property interest. A-12. Consequently, the SJC did not have to consider whether such "inchoate rights" constituted a property interest entitled to due process protection or protection against taking without just compensation. Had the SJC recognized the Quirks' property interest, the rights to due process and just compensation would indisputably have followed.

In a footnote in the Decision, the SJC stated that no separate

constitutional argument was raised. A-4, n.4. This is because no separate argument was necessary. Contained in the Quirks' argument regarding whether the tax taking interrupted the period of adverse possession were their constitutional arguments concerning their rights to due process and just compensation. A-43-47. Their constitutional rights would indisputably have derived from their property interest and, accordingly, argument on such issues was so obvious that a separate argument was unnecessary. In view of the ruling on the motion in limine, the record was barren of facts on these issues. The Quirks should have been allowed to prove the absence of due process and the taking without just compensation. The SJC should have recognized the property interest of the Quirks and remanded the

case to the Land Court for a hearing on these issues. Its failure to do so was error.

ARGUMENT

The Massachusetts courts denied the Quirks due process by failing to recognize their property interest in the land in question and consequently depriving them of a property interest without notice, an opportunity to be heard or just compensation. The Decision applied Massachusetts law in a manner which deprived the Quirks of equal protection under those laws.

1. The Quirks Had a Protected Property Interest.

The premise underlying the Decision is that the Quirks, as adverse possessors, have no property interest in the Locus. By mischaracterizing the interest of the Quirks, the SJC erred in failing to recognize their property

interest and their resultant due process rights.

State law may create a property interest entitled to due process protection. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 485 (1988), this Court found "little doubt" in the proposition that an unsecured claim against an estate was a property interest protected by the Fourteenth Amendment, Section 1.

Massachusetts law recognizes the property interest of an adverse possessor.

The Massachusetts statutory schemes for resolving land claims protect the property interests of adverse possessors. A petition for registration

of title to land is an in rem proceeding, with provisions for notice to all interests. See, Mass. Gen. Laws c. 185.

Other statutory and common law schemes for asserting ownership and possessory interests, including an action for a writ of entry pursuant to Mass. Gen. Laws c. 237 or an action for trespass, provide for service of process, notice and an opportunity to be heard. These provisions afford an adverse possessor due process rights.

In addition, Mass. Gen. Laws c. 237, § 16, A-40, permits an adverse possessor to recover for improvements to the land "actually held and possessed" for six years, recognizing a property interest in the adverse possessor after six years.

Massachusetts recognizes that a person in adverse possession has rights

against all but the disseised owner and those having a superior right of possession. Uliasz v. Gillette, 357 Mass. 96, 105 (1970); New England Box Co. v. C & R Construction Co., 313 Mass. 696, 707 (1943).

In Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), cert. denied, 424 U.S. 916 (1976), the First Circuit found, on the facts presented, that no due process property interest existed in adverse possessors under Puerto Rico law. In Amezquita, there were no dealings between the adverse possessor of state land and the state before the adverse possessors were ejected from the land. However, in a footnote, the court noted in dictum that other circumstances would create a protected property interest: "An express or implied license to occupy the land would

have controverted bad faith and produced a liberty of property interest for plaintiffs." 518 F.2d at 13 n. 9. Here, the Town issued a building permit and licenses for the rodeos to the Quirks, thereby issuing an "express or implied license to occupy the land." The Quirks' application for and receipt of the license "contraverted bad faith" as contemplated in Amezquita and "produced" a constitutionally protected property interest.

The adverse possession of the Quirks thus was a property interest entitled to due process protection. The Decision fails to recognize this.

2. The Decision Denies Due Process to Persons in Adverse Possession Like the Quirks.

The Quirk's property interest entitled them to due process. The failure to recognize this resulted in

the granting of the motion in limine, which preluded evidence on due process. The Decision, if upheld, would erode substantial authority of this Court insuring constitutional protection of property interest. This Court has strongly guarded the right to notice and hearing, particularly when the interests are known and even when the interests are small.

Here, the Town knew of the Quirks' interest and had recognized the interest by granting a building permit and rodeo licenses. Nevertheless, the Town failed to give to the Quirks the necessary notice and thereby failed to comply with the requirements of due process.

The Decision concludes that the mere act of taking for non-payment of taxes by the Town interrupts adverse

possession. See, A-15. Such a taking, which requires no service of notice to any one other than the record owner, see, Mass. Gen Laws c. 60, § 53, A-37, means that even where the Town knows of an adverse possessor, it can interrupt that possession and destroy the property interest without notice or an opportunity to be heard.

The Quirks should have been given notice. This Court's decisions have made it plain that where a party's interest is known, notice should be given. For example, publication by notice is insufficient when the intended recipients are actually known. Tulsa Professional Collection Services, Inc. v. Pope, supra, 485 U.S. at 490-91; Mennonite Board of Missions v. Adams, 462 U.S. 791, 798 (1983); Mullane v. Central Hanover Bank & Trust Co., 339

U.S. 306 (1950). As this Court noted in Mullane, "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U.S. at 315.

In Tulsa, supra, the case was remanded "for further proceedings to determine whether 'reasonably diligent efforts,' Mennonite, supra, 462 U.S., at 798, n. 4, would have identified appellant and uncovered its claim. If appellant's identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process." 485 U.S. at 491. The Decision is in conflict with Tulsa.

That the Quirks, at some point, learned of the series of proceedings

involving the Locus is irrelevant when, as here, they were entitled to proper notice and did not receive it. See, City of New York v. New York, N.H. & H. R. Co., 344 U.S. 293, 297 (1953).

The Decision takes the property of the Quirks, their adverse possession right, without notice of the state action which accomplished it, nor an opportunity to be heard. The Decision places undue limitations upon property rights and is in direct conflict with such decisions as Tulsa, Mennonite and Mullane.

3. The Decision Permits a Taking of Property Without Compensation.

The Decision permits the Town to take the Quirks' property without compensation. The Decision allows the Town to cut off the Quirks' term of adverse possession, and reset the clock.

The Town did not assess the Quirks but proceeded only against the disseised record owners of the Locus. By proceeding solely against third parties, the Town has taken property of the Quirks, their adverse possession interest, without compensation. This violates the Takings Clause of Amendment V.

The Decision is contrary to Hodel v. Irving, 481 U.S. 704 (1987), which held that a property owner is entitled to compensation for even a small property interest. Hodel prohibited the escheat of fractional land interests as small as one millionth of one percent. See, 481 U.S. at 712-13. Hodel repeated the statement in Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979) that no set formula exists for determining violation of the Takings Clause, but rather that it is examined

on an ad hoc basis, with inquiry into "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." 481 U.S. at 714.

Here, the interests of the Quirks in the Locus, some seventy acres of land on Cape Cod, is as great as that of the microscopic interests in issue in Hodel. The Quirks built a house and made other improvements necessary to conduct rodeos on the Locus. Their investments of money and time evidence an expectation that they would receive a return.

The character of the governmental action also supports a finding of a violation of the Takings Clause. The Decision makes the tax taking by the Town an act that destroys the entire

property interest of the Quirks, a third party to the tax taking. The Quirks lost not merely one "strand", but rather the full "bundle" of their property rights. See, Hodel, supra, 481 U.S. at 716; compare, Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

4. The Decision Denies Equal Protection of the Laws to the Quirks.

The Decision denies equal protection of the laws to the Quirks in violation of Amendment XIV, Section 1.

A purchaser of property from a disseised owner takes the property subject to the prior period of adverse possession, which is "tacked" onto the time running against the buyer. In order to interrupt the adverse possession the buyer may bring an action for a writ of entry to the property. See, Mass. Gen. Laws c. 183, § 7, A-39.

The Decision creates an exception to the rule for municipalities. A tax taking that transfers title as between the Town and the record owner, an act accomplished in substantially the same manner as recording a deed, see, Mass. Gen. Laws c. 60, § 53, A-37, interrupts the adverse possession.

In Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia, 488 U.S. 336 (1989), this Court noted that while a statutory scheme that permits unequal tax assessments might survive equal protection scrutiny, where the statutory scheme called for equal assessments, unequal assessments violated the Equal Protection Clause. See, 488 U.S. at 344-45 and n. 4. Here, once Massachusetts enacted its statutory determination that, in matters of adverse

possession, towns were to stand on equal footing with private parties, equal protection required equal treatment.

While a state could favor municipalities over private parties, 1/ in Massachusetts, such a rule was repealed by statute. Mass. Gen. Laws c. 260, § 31, A-40, expressly permits adverse possession against a municipality. Thus, the Town stands on equal footing with private parties with respect to

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1/ The Quirks recognize that such a rule could be formulated in a way which was "rationally related to a legitimate state interest," Pennell v. City of San Jose, 485 U.S. 1, 14 (1988), quoting, New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Indeed, such a rule exists in other jurisdictions as expressed in the maxim that "time does not run against the sovereign", or quod nullum tempus occurrit reqi. See Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132 (1938).

adverse possessors,[2/] and is to be treated the same. Unlike such cases as United States v. Sperry Corp., ___ U.S. ___, 110 S.Ct. 387, No. 88-952 (Nov. 28, 1989), and Ft. Smith Lumber Co. v. Arkansas, 251 U.S. 532 (1920), the Massachusetts statutes do not create the distinction that gives rise to the unequal treatment. Instead, the statutes seek to abolish the very inequality reimposed by the Decision.

The Decision's interpretation of the statutory scheme creates an illogical result that cannot withstand examination under the Equal Protection Clause. If a disseised owner conveyed

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2/ The SJC analysis of this statute is incorrect, since it relied upon an amended version of the statute expressly inapplicable to the situation here. See 1987 Mass. Acts, c. 564, §§ 46 and 54, A-41.

title to a town by deed, the town would take the right to bring an action for a writ of entry, with the pre-deed period of adverse possession "tacked" onto the post-deed period. See, Mass. Gen. Laws c. 183, § 7, A-39. Yet, if the conveyance is in the form of an instrument of taking rather than a deed, the adverse possession is broken and the period reset. That difference is as arbitrary and illogical as the difference in taxing that was found to violate the Equal Protection Clause in Williams v. Vermont, 472 U.S. 14 (1985).

Here, the equal protection issues are as significant as those in Allegheny and Williams. Just as the petitioners in Allegheny had a right under Pennsylvania law to equal tax assessments, and the petitioners in

Williams had an equal right to use tax credits, so too do the Quirks have a similar right under Massachusetts law to possess adversely against the Town. The Decision, which denies that right to the Quirks, acts to deprive the Quirks of equal protection under the law, in violation of Amendment XIV, Section 1.

CONCLUSION

This case is the result of an unconstitutional application of what could have been a constitutional statutory scheme. By its Decision, the SJC allowed an action by the state against one party to deprive another party of property without compensation, notice or an opportunity to be heard and the opportunity to protect themselves and their property rights.

The Decision narrows the scope of protected property rights. It removes from due process protection an important property right. The logic of the SJC Decision could extend to other property interests, especially other inchoate rights. The Decision allows a municipality to use its limited interest in collecting taxes from one party to destroy the property interest of a third party without compensation, notice or an opportunity to be heard, and denies equal protection under the stated statutory scheme.

The Quirks have been deprived of their property. This Court, by granting the writ and correcting this error, can reinforce the property rights

of individuals and delineate the constitutional limits of local taxing powers.

Respectfully submitted,

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S-5448 S.J.C.

TOWN OF SANDWICH vs.

PAUL E. QUIRK & another[1/]

(and a companion case[2/]).

Suffolk.

November 8, 1990. - February 21, 1991.

Present: Liacos, C.J., Wilkins, Abrams, Lynch, & Greaney, JJ.

Adverse Possession and Prescription. Municipal Corporations, Tax title property, Adverse possession. Real Property, Adverse possession.

1/ Beatrice Quirk.

2/ The two actions assert the town's ownership of certain land. One was brought in Superior Court in Barnstable County by the selectmen on behalf of the inhabitants of the town. The other was brought in the name of "Board of Selectmen, Town of Sandwich" in the Land Court in the nature of a writ of entry under G.L. c. 237, §1. The Chief Administrative Justice assigned a judge of the Land Court to the Superior Court to decide the Superior Court action.

Civil action commenced in the Superior Court Department on August 29, 1986.

Civil action commenced in the Land Court Department on January 29, 1987.

The cases were consolidated for trial and were heard by Marilyn M. Sullivan, J., sitting under statutory authority.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David A. Capobianco (Frederick A. Busconi with him) for the defendants.

Everett J. Marder for the plaintiff.

WILKINS, J. These actions concern the ownership of four adjacent parcels of land in Sandwich, each of which, at various dates, the town took for the nonpayment of taxes and as to which, in the 1970's, the Land Court entered decrees foreclosing the record owners' rights of redemption. The defendants (Quirks) assert that they have acquired

title to the parcels by adverse possession.

The judge ruled that the town was entitled to possession of two parcels and to an injunction barring the Quirks from using the remaining two parcels for access to the first two. She accepted the town's position that the tax takings, followed by the foreclosure of the record owners' rights of redemption, interrupted the running of the twenty-year period of adverse possession. If either or both of those events broke the continuity of adverse possession, it is agreed that the Quirks have not adversely possessed or used the subject parcels for a sufficient period to assert rights based on adverse

possession or prescription.[3/] As a result of her ruling that there could be no adverse possession as a matter of law, all factual issues concerning adverse possession were eliminiated from the trial. Judgments were entered for the town. We transferred the Quirks' appeal to this court. We consider and decide only the issue on which the judge rejected the adverse possesssion claim.[4/] We affirm the judgments.

3/ The judge noted that, on the facts, it did not matter whether the tax foreclosure proceedings against the record owners alone cut off any party who claimed title to the land adversely or whether the decrees foreclosing the record owners' rights of redemption did so. She suggested, however, that the tax foreclosure proceedings themselves would cut off adverse claims.

4/ That is the only issue the Quirks argue that we need to decide. The Quirks make no separate argument based on constitutional rights or on the town's rejection of their attempt to pay taxes on the subject property, to which they apparently knew they did not [Cont.]

The judge did not reach the question whether, as a matter of law, title could be acquired by adverse possession of land owned by a town through tax title proceedings, followed by foreclosure of rights of redemption. She assumed, for the purpose of analysis, that the Quirks could properly possess adversely to the town, citing Cohasset v. Moors, 204 Mass. 173 (1910), and Bates v. Cohasset, 280 Mass. 142 (1932). The parties discuss this issue in their briefs. The Quirks do not cite G. L. c. 260, § 31 (1988 ed.), which states a general rule that the Commonwealth and its political subdivisions may lose

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4/ [Cont.] have record title. The issue of the right of an adverse possessor to pay real estate taxes assessed against the adversely possessed land is not before us. See G. L. c. 60, § 60 (1988 ed.), concerning the rights of a nonowner who "rightfully" pays taxes assessed against land.

rights to land through twenty years of adverse possession. That section states an exception, which is set forth in the margin,[5/] for municipal (and other governmental) land held for a "public purpose." The town discusses § 31 and says that it is a question of fact, not resolved below, whether the town holds the land in question for a public purpose. The town, therefore, does not contend that we could affirm the lower court on the ground that land taken for nonpayment of taxes is held for a public purpose and hence the Quirks could not

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5/ "[P]rovided, further, that this section shall not bar any action by or on behalf of the commonwealth, or any political subdivision thereof, for the recovery of land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose."

adversely possess the land.[6/]

The judge saw an instructive analogy between the town's Land Court action to foreclose the record owners' rights of redemption and a petition to register title to land. There is a similarity between the two proceedings in that, in each, the plaintiff is

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6/ The town does not cite G. L. c. 60, § 77 (1988 ed.), which provides that, after a town forecloses "rights of redemption under a tax title or taking, as hereinbefore provided, the land shall thereafter be held . . . for municipal purposes." The town has not argued, therefore, that, as a matter of law, land held for municipal purposes, within the meaning of G. L. c. 60, § 77, is land held for a public purpose, within the meaning of those words in G. L. c. 260, § 31, and that, consequently, § 31 provides no bar to the town's assertion of its ownership of the disputed land. Compare Johnson v. Burgeson, 25 Wash. 2d 269, 272 (1946)(tax foreclosure destroys possessory titles because land is held in govermental and not proprietary capacity) with Goldman v. Quadrato, 142 Conn. 398, 403-404 (1955) (land acquired by city on foreclosure of tax lien not devoted to public use).

seeking by judicial decree, after notice, to obtain a clearly defined title to the land. The analogy, however, is not perfect. Rights in registered land, in derogation of the title of the registered owner, may not be acquired by prescription or adverse possession. G. L. c. 185, § 53 (1988 ed.). Consequently, the filing of a petition to register title to land immediately interrupts adverse possession of that land. McMullen v. Porch, 286 Mass. 383, 388-389 (1934). See Snow v. E.L. Dauphinais, Inc., 13 Mass. App. Ct. 330, 336 (1982). There is no comparable statute, however, that states explicitly that there can be no adverse possession against a municipality's interest in land once the record owner's right of redemption has been foreclosed (or at

some earlier date).[7] The comparison of the foreclosure of the right of redemption and a petition to register title to land is instructive but not conclusive.

We must decide whether the tax takings and foreclosure decrees broke the continuity of the Quirks' adverse possession, thus in effect turning the adverse possession clock back to zero. No Massachusetts case had decided this question, which was noted, without even a hint of the possible answer, in Harrison v. Dolan, 172 Mass. 395 (1899).[8]

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[7] There is the statute, we discussed above, that allows a municipality at any time to recover possession of land it holds for a public purpose. G. L. c. 260, § 31. See note 5, supra.

[8] The court observed that "[i]t may be said that, as a tax sale, if valid, gives a good title as against all the world, it is like prescription, and [Cont.]

We must make a public policy determination, guided by such legislative expressions of policy as seem helpful. We know, for example, that the concept of adverse possession is not so powerful as to be allowed to override the certainty of title in registered land. We know, on the other hand, that the interests of a municipality as an owner of land are not so strong that in all instances there can be no adverse possession against it.

The Legislature has provided that "title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption by decree of the land court." G. L. c. 60, § 64.

8/ [Cont.] really begins a new title which can be barred only by twenty years of adverse holding after the new title begins." Id. at 397.

This provision makes clear that interests in the land of one claiming through the record owner, such as "mortgagees, lienors, attaching creditors" (G. L. c. 60, § 66 [1988 ed.]), are terminated by the decree. Easements and other servitudes burdening the land are not extinguished. See G. L. c. 60, §§ 45, 77 (1988 ed.); Crocker-McElwain Co. v. Assessors of Holyoke, 296 Mass. 338, 347-348 (1937); 2 American Law of Property § 8.104 (1952 & 1977 Supp.). The absolute title proclaimed by § 64 clears the record title so that the municipality may sell the property or keep it for municipal purposes, free of the claims of the prior owner and other persons whose rights are extinguished. This legislative purpose suggests that an adverse possessor's rights should be subordinate to those of a municipality.

Moreover, traditionally no significant equities have been recognized in favor of an adverse possessor, one who is a trespasser.

Whether by negligence, ignorance, indifference, or otherwise, the record owners in this case were deficient in two respects in protecting their interests. They failed to guard against the loss of their property either to the local tax-gatherer or to trespassers like the Quirks.

The town is in a different position from a private person purchasing a record owner's interest who would take subject to the accruing or accrued rights of the municipality and to the inchoate rights of the trespasser. The policy question comes down to whether we should recognize the years of adverse possession that the Quirks were

permitted to accumulate because of the omissions of the record owners and the delay of the town in protecting its rights. The generally valid public purpose that, through adverse possession, land titles can be cleared and, thereby, barriers to the worthwhile use of land can be eliminated, lacks significant weight as an argument for the Quirks. When, as in this case, land has been taken for taxes and the right of redemption has been foreclosed, the title is cleared (assuming lawful processes were followed), and a public entity decides what to do with the land, either hold it for municipal purposes or sell it. During any part of the twenty-year period of the statute that has run prior to the tax taking, a municipality had no right to challenge the trespass. Further, assuming the land has some value, the

municipality has no practical option, as would a prospective arm's-length purchaser of the property, not to take over the property (for nonpayment of taxes) at some point.

We see no public policy reason to adopt a common law rule that would burden the municipality, or more specifically its taxpayers, with the omissions of the record owners from whom the property was taken for nonpayment of taxes or with the omissions of public officials who may have unreasonably delayed taking steps to protect the public's interests by taking the property for nonpayment of taxes. We have been reluctant to visit upon the public the consequences of the failure of public entities and officials to protect the public's interest. See Phipps Prods. Corp. v. Massachusetts Bay Transp.

Auth., 387 Mass. 687, 694 (1982); Doris v. Police Comm'r of Boston, 374 Mass. 443, 449 (1978). See also Levasser v. Washburn, 52 Va. (11 Gratt.) 572, 577 (1854) (time does not run against the sovereign because of "the great public policy of preserving public rights and property from damage and loss through the negligence of public officers").

The statute of limitations starts to run against a municipality, if it runs at all, when it takes adversely possessed land for nonpayment of taxes. Such a rule provides a clear starting point. It also protects the public interest.[9/]

Judgments affirmed.

9/ Because most jurisdictions do not permit interests in land held by a governmental unit to be acquired by prescription or by adverse possession, the question whether a tax deed to a governmental unit itself breaks the continuity [Cont.]

9/ [Cont.] of any adverse possession rarely arises elsewhere. Procedures and statutes vary among jurisdictions, making rulings elsewhere an uncertain guide. There is some support for the view we take of the consequences of tax taking. See Winstead v. Winstead, 204 Miss. 787, 789 (1948) (adverse possession tolled by sale to State for taxes); Lyndel Corp. v. Loria, 77 Misc. 2d 1066, 1068 (N.Y. Civ. Ct. 1973) (any adverse possession is abrogated by deed to city pursuant to in rem foreclosure action); Johnson v. Burgeson, 25 Wash. 2d 269, 270, 271, quoting Gustaveson v. Dwyer, 78 Wash. 336, 338-339 (1914) (County took title through foreclosure and sale for delinquent taxes. "Manifestly, both record and possessory titles are equally absolutely destroyed by such a foreclosure"). Contra Goldman v. Quadrato, 142 Conn. 398, 403-404 (1955) (by implication, tax title by foreclosure does not affect adverse possession.)

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

(SEAL) DEPARTMENT OF THE TRIAL COURT

Barnstable, ss.

BOARD OF SELECTMEN, TOWN OF SANDWICH, Plaintiff vs. PAUL E. QUIRK and BEATRICE QUIRK, Defendants	Miscellaneous Case No. 122236
BOARD OF SELECTMEN, TOWN OF SANDWICH, Plaintiff vs. PAUL E. QUIRK and BEATRICE QUIRK, Defendants	Superior Court Civil Action No. 46666

ORDER GRANTING PLAINTIFFS' MOTION IN LIMINE

In the motion in limine filed in the above numbered actions by the plaintiff, the Town of Sandwich seeks to

exclude any evidence of adverse possession by the defendants, Paul E. Quirk and Beatrice Quirk. The motion is grounded on the plaintiff's allegation that the institution of tax title foreclosure proceedings in the Land Court and the entry by this Court of final decrees in Tax Lien Case Nos. 45919, 47516, 48679 and 51935, effectively stopped the running of the period of adverse possession, and that accordingly, any acts evidencing such possession which occurred after the entry of the final decrees being less than twenty (20) years ago, are immaterial. The present action in the Land Court is a civil action in the nature of a writ of entry brought pursuant to the provisions of G.L. c. 237 and the Superior Court case is a civil action alleging common law trespass. In the latter action an

interlocutory order was entered by Honorable Elizabeth J. Dolan restraining the defendants from encroachment, use, construction of structures, removal of trees on two of the parcels of land situated in the Town of Sandwich, described in the complaint in the Land Court action. The issue presented by the motion in limine is a matter of first impression in this Commonwealth, and the motion seems an inappropriate vehicle for making such a far-reaching ruling; however, the parties have fully briefed the matter, and accordingly, I have elected to rule on the motion on the substantive grounds argued by the parties in order that the issue may be determined without unnecessary expenditure of further time and money.

The issue presented is a narrow one. The defendants have been using

land which, for purposes of this motion, the parties agree was the subject of the four tax title proceedings in the Land Court in which final decrees were entered in 1971, 1973, 1975 and 1977, respectively, none of which is more than twenty (20) years ago. The defendants admit that they have not used the premises in question for a sufficient length of time to have acquired title thereto by adverse possession prior to the filing of the complaints by the Town of Sandwich to foreclose the tax payer's right of redemption. If the bringing of such complaints and the ultimate entry of final decrees foreclosing such rights interrupts the running of the twenty (20) year period of adverse possession, and bars the defendants from tacking possession before and after the entry of the decrees, there has been insufficient

time since the entry of the final decrees for adverse possession to have been obtained by the defendants. For purposes of this discussion, the Court has assumed that adverse possession does indeed run against a governmental entity such as a municipality, a question which I therefore do not decide. See, for example, Inhabitants of Cohasset v. Moors, 204 Mass. 173 (1910) and Bates v. Cohasset, 280 Mass. 142 (1932).

The authorities in other jurisdictions are divided on the question now before the Court. In view of the differences in the various tax statutes little is to be gained by a comparative study of such cases. In McMullen v. Porch, 286 Mass. 383 (1934), the Supreme Judicial Court held that the filing of a petition to register title to land interrupted the adverse possession of

the party claiming in opposition to the petitioner. In the decision, Justice Crosby discussed two analagous situations. At page 388 he stated "[i]t has been held in this Commonwealth that in real actions judgment must be rendered upon the state of the title as it existed at the date of the writ, and that adverse possession is interrupted at the time, provided the plaintiff is ultimately successful. These cases all relate to writs of entry." The Court then distinguished cases involving a partition where the determinative date had been found to be the trial of the action, rather than the date of filing of the petition for partition. The McMullen doctrine was recently reaffirmed by the Appeals Court in a decision overruling one made by this Court in a registration case. In Snow v. E.L. Dauphinais, Inc., 13 Mass. App. Ct. 330

(1982), the Appeals Court stated "[t]he filing of a petition is 'significa[nt]' to a claim of adverse possession in that 'the so called acquiescence of an owner of land in hostile possession thereof, - as distinguished from permission for possession not hostile - implied from the failure of an owner to assert his rights effectively against a person in adverse possession, comes to an end when - and as of the date of the petition - such owner effectively asserts his rights by a petition for registration.'"

The present case seems analagous to the principles applied to a petition for registration. By filing the Land Court action, the Town of Sandwich sought to acquire title as against the record owner of the premises under whom it now claims by operation of law. The procedure provided by the General Court in c. 60, §65, et seq., gives

notice to all the world through publication and recording in the Registry of Deeds, as well as to the record owners, and others with an interest, by certified mail, and indeed the Court understands, although placing no weight on this aspect in view of the nature of the motion, that the defendants had actual notice of the tax proceedings. The filing of the Land Court petitions in which the Town successfully prosecuted to final decree was an effective assertion of the rights of the Town of Sandwich which as a matter of law concluded use of the land adversely by the defendants. The paramount title of the town therefore bars the defense by the defendant of adverse possession, a result presaged by Justice Holmes' decision in Langley v. Chapin, 134 Mass. 82 (1883).

In order to prevail, therefore, on the defense of adverse possession,

the defendants would have to show adverse possession of the land as against the Town of Sandwich for a period of at least twenty (20) years commencing with the entry of the final decrees, if we assume that land acquired by the Town through the tax title foreclosure provisions can be adversely possessed. Since less than the required period of time has elapsed from the entry of the decrees, the defendants as a matter of law will be unable to prevail on the defense of adverse possession, and thus, evidence thereof will be excluded.

By the Court (Sullivan, C.J.)

Attest:

Charles W. Trombly, Jr.
Recorder

Dated: March 2, 1989

A TRUE COPY ATTEST:

Charles W. Trombly, Jr.
RECORDER

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Barnstable, ss.

BOARD OF SELECTMEN, TOWN OF SANDWICH, Plaintiff vs. PAUL E. QUIRK and BEATRICE QUIRK, Defendants	]	Miscellaneous Case No. 122236
BOARD OF SELECTMEN, TOWN OF SANDWICH, Plaintiff vs. PAUL E. QUIRK and BEATRICE QUIRK, Defendants	]	Superior Court Civil Action No. 46666

D E C I S I O N

The Town of Sandwich instituted two actions against Paul E. Quirk and Beatrice Quirk of said Sandwich, in the

County of Barnstable. The initial case was brought in the Superior Court alleging a common law trespass on parcels D-6 and D-9 on assessors' map 60, and a preliminary injunction was issued by Justice Elizabeth J. Dolan in which the defendants were ordered to cease and desist from activities upon said lots which, as clarified by the Court, was interpreted to mean that no further actions were to be taken by the defendants to alter the land. Subsequently, a writ of entry, pursuant to the provisions of G.L. c. 237, s. 1, was brought in the Land Court. The Land Court case sought possession not only of Lots D-6 and D-9, but D-7 and F-2 as well. I was designated by the Chief Administrative Justice to sit as a Superior Court Justice on the trespass case, and both actions were tried together on February 9 and

March 15, 1989. At the first day of trial, the Town made a motion in limine that evidence of adverse possession by the defendants be excluded. It was argued by the Town that the filing in the Land Court of tax title foreclosure proceedings by the Town and the entry by this Court of final decrees in Tax Lien Case Nos. 45919, 47516, 48679 and 51935 interrupted the adverse possession claimed by the defendants, and there being no period of twenty years' use prior to the institution of such proceedings,[1] nor after the conclusion, the defendants should be barred from introducing evidence of use made by them of

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1 It was unnecessary to decide in the proceeding whether tax foreclosure proceedings against the record owner cut off a party who claims adversely. In an appropriate case I suggest, but do not decide, that it does.

the premises in order to establish title by adverse possession. The motion was allowed by decision dated March 2, 1989, a copy of which is attached.

At the trial a stenographer was appointed to record and transcribe the testimony. The witnesses were Michael Marsh, a Land Court Title Examiner and member of the Bar, William Maravell, the Town Engineer for the Town, and John Ellis, a principal in the firm of Ellis & Thulin, Inc. The witnesses all testified on behalf of the Town. All exhibits introduced into evidence are incorporated herein for the purpose of any appeal.

The defendants introduced no evidence since they claimed the order of the Court as to adverse use was in error, and their defense was based on a claim of adverse possession.

On all the evidence, I find and rule as follows:

1. A final decree entered by the Land Court in Case No. 47516 forecloses the tax payer's equity of redemption in what is now assessors' lot F-2, the final decree in Tax Lien Case No. 48769 foreclosed such rights in Lot D-9, the final decree in Tax Lien Case No. 51935 foreclosed said right in Lot D-7, and the final decree in Tax Lien Case No. 45919 foreclosed the right of redemption in assessors' Lot D-6. A question was raised as to the validity of the decree in the latter Land Court case, but the Court ruled that the decree could not be collaterally attacked.

2. The defendants constructed a driveway which crosses F-2, D-6, D-7 and D-9 (and D-8 which is said to belong to a third party). There presently is a

building on D-9 and the defendants' home in which they live is located on D-6. The building on D-9 appears to be a rodeo stadium where contests involving horses and riders are held.

On the findings I have made it seems clear that the defendants are trespassing on four lots of land to which the Town holds record title. The construction of the buildings in question on Lots D-6 and D-9 and the use of a driveway on the other two lots for access to and egress from the premises constitute a common law trespass. Any question of damages incurred by the Town of such trespass has been severed, and no finding has been made thereon at this time until after all appeals finally have been determined. In addition, the complaint does not allege a trespass on

any but Lots D-6 and D-9 and the Judgment in the Superior Court action will be framed to reflect this.

So far as the Land Court writ of entry is concerned, the Town clearly is entitled to regain possession of Lots D-6 and D-9. Technically, however, they have possession of the remaining two lots in question, F-2 and D-7, since use by the defendants is of a limited nature akin to an easement or right of way if it had been continued for a sufficient period of time. Accordingly, upon the proper amendment under the complaint, the defendants can be restrained from using the driveway on the two lots in question, but there is no showing of disseisin to support a judgment as to that entitling the Town to relief by an action in the nature of a writ of entry.

The defendants have filed extensive requests for findings of fact and rulings of law which are addressed to a posture of the case not adopted by the Court, and accordingly, I have taken no action on them.

Judgment accordingly.

Marylyn M. Sullivan
Chief Justice

Dated: June 21, 1989

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

AT BOSTON, February 21, 1991.

IN THE CASE NO. SJC-5448

TOWN OF SANDWICH

vs.

PAUL E. QUIRK & another
& a companion case.

pending in the Superior Court Department for the Court for the County of Barnstable, No. 46666

ORDERED, that the following entry be made in the docket; viz.,-

Judgments affirmed.

BY THE COURT,

Jean M. Kennett, CLERK

February 21, 1991

COMMONWEALTH OF MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

Barnstable, ss.

BOARD OF SELECTMEN, TOWN OF SANDWICH,	]	Miscellaneous Case No. 122236
Plaintiff	]	
vs.	]	
PAUL E. QUIRK and BEATRICE QUIRK,	]	
Defendants	]	J U D G M E N T

This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it is

ADJUDGED and ORDERED that the plaintiffs are entitled to possession of Lots D-6 and D-9 to which they hold record title by virtue of Land Court proceedings in Tax Lien Case Nos. 48769 and 45919, and that upon amendment

within ten days after the entry of this Judgment, they also are entitled to an injunction restraining the defendants and those claiming under them from passing and repassing across Lots F-2 and D-7 for access to and egress from the lots first above mentioned.

By the Court (Sullivan, C.J.)

Attest:

Charles W. Trombly, Jr.

Recorder

Dated: June 21, 1989

MASS. GEN. LAWS c. 60, §53

If a tax on land is not paid within fourteen days after demand therefor and remains unpaid at the date of taking, the collector may take such land for the town, first giving fourteen days' notice of his intention to exercise such power of taking, which notice may be served in the manner required by law for the service of subpoenas on witnesses in civil cases or may be published, and shall conform to the requirements of section forty. He shall also, fourteen days before the taking, post a notice so conforming in two or more convenient and public places.

Whenever the collector of taxes of a city or town shall have taken land therein he may, in the name and on behalf of said city or town, take immediate possession of such land and, until

the tax title so acquired is redeemed, collect the rent and other income from such land, which rent and income, after the payment therefrom of all necessary expenses in the care, repair and management of such land, shall be applied on account of the taxes, assessments, rates, charges, interest and costs due said city or town on said land, with any balance remaining being paid to the person otherwise entitled thereto. Upon petition of any person having a right to redeem such tax title, the superior court for the county within which the land lies, if it adjudges justice and the circumstances so warrant, may, upon such terms as it shall deem equitable, enjoin a taking of possession under this section or command the surrender of a possession taken.

Neither said city or town nor any of its officers, agents or employees

shall be liable or accountable to the owner or to any other person having any interest in such land for failure to collect rent or other income therefrom; and neither said city or town nor any of its officers, agents or employees shall be liable for injury or damage caused by the possession of land under the section to such land or to the person or property of any person.

MASS. GEN. LAWS, c. 183, § 7

A conveyance of land, if otherwise valid, shall, notwithstanding disseisin or adverse possession, be as effectual to transfer the title of the grantor as if he were actually seized and possessed of such land, and shall vest in the grantee the rights of entry and of action for recovery of the estate incident to such title.

MASS. GEN. LAWS, c. 237, §16

If the land demanded has been actually held and possessed by the defendant and by those under whom he claims for six years next before the commencement of the action, he shall, if judgment is against him, be entitled to compensation as hereinafter provided for the value of any buildings or improvements made or erected on the land by him or by any person under whom he claims.

MASS. GEN. LAWS, c. 260, §31

No action for the recovery of land shall be commenced by or in behalf of the commonwealth, except within twenty years after its right or title thereto first accrued, or within twenty years after it or those under whom it claims have been seized or possessed of the premises; but this section shall not apply to the province lands in the town

of Provincetown lying north and west of the line fixed by section twenty-five of chapter ninety-one, to the Back Bay lands, so called, in Boston, or to any property, right, title or interest of the commonwealth below high water mark or in the great ponds.

1987 MASS. ACTS, CH. 564

Section 46. The provisions of sections fifty-one and fifty-four of this act shall not be construed to abrogate the rights of any person in an action to establish title by adverse possession who has seized or possessed real property or an interest in real property for no less than twenty years pursuant to section thirty-one of chapter two hundred and sixty of the General Laws prior to the effective date of this act.

Section 54. Section 31 of chapter 260 of the General Laws, as so appearing, is hereby amended by inserting after the word "ponds", in line 9, the words: provided, further, that this section shall not bar any action by or on behalf of the commonwealth, or any political subdivision thereof, for the recovery of land or interests in land held for conservation, open space, parks, recreation, water protection, wildlife protection or other public purpose.

MEMORANDUM SUBMITTED IN OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE (EXCERPT)

Conversely, the Town in this case must be estopped from claiming title as a result of its failure to accept tax receipts from the Defendants. Such an estoppel argument affirms the respect with which our society regards the right of private ownership of property and due process. The right of ownership of property was mandated by the framers of our Federal and State Constitution. The government, either Federal, State, County or Municipal is barred from denying these fundamental rights. U.S. Const. Amend. 15 §1; Mass. Declaration Rights - Article 10.

BRIEF OF APPELLANTS (EXCERPTS)

Pages 8-9

This Court has consistently interpreted real estate taxation statutes, Mass. General Laws Chapter 60, Section 1 et seq, as remedial in nature; favoring the individual property owners rights to ownership when seeking to recover his land, Union Trust Co. v. Reed, 213 Mass. 199 (1912); Davidson v. Sanford, 210 Mass. 145 (1911); Bartevian v. Cullen, 369 Mass. 819 (1976); Szctzawinsky v. City of Lynn Land Court, Department of Trial of Tax Lien Case, NES 72650, 72652 and 73251. Such decisions and public doctrine affirm the respect with which our society regards the right of private ownership of property and due process. This right of ownership of property was mandated by the framers of our Federal and State

Constitutions. The Government, either Federal, State, County or Municipality, is barred from denying this fundamental right, U.S. Constitutional Amendment V, XIV and XV; Massachusetts Declaration of Rights, Article 10; see also a Limited Partnership et al. v. The Town of Burlington et al, 399 Mass. 771 (1987).

. . .

Pages 14-15

This requirement of due process is the final distinction which the Trial Judge failed to consider in her decision. When one compares a Tax Taking with a petition to register title, it is obvious that one is a personal action at law between parties (exclusive of the Adverse Possessor); the other a proceeding in rem against the land; one seeks to recover taxes, the other to register title; one is begun by a complaint

against the land owner (exclusive of the Adverse Possessor), the other by petition to the Court against the World with no defendants; one requires notice to the land owner (exclusive of the Adverse Possessor), the other requires notice to the World by publication. This disregard of the Adverse Possessor's right to due process is contrary to every principle of "equity and good conscience", Union Trust Co., supra; Jenney v. Tilden, 270 Mass. 97 (1930).

Similarly, the Trial Judge failed to recognize the constitutional issues and requirements of "public purpose" and "fair compensation" when such takings occur under the Law of Eminent Domain. These requirements mandate that such takings be for a public purpose and that a reasonable compensation be paid; see In Re Opinion of the Justices, 365

Mass. 681 (1974); Caleb Pierce, Inc. v. Commonwealth, 354 Mass. 306 (1968). The Trial Judge in her decision is, in effect, permitting a Town, the right to confiscate "carte blanche" real estate from private individuals (whenever a tax deficiency exists) in blatant disregard and circumvention of Eminent Domain principles and practice.